

**A Poliklinik Bakti Anz Sdn Bhd & Anor v Pengarah Kesihatan
Negeri Pulau Pinang & Ors**

B HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 21NCVC-17-07
OF 2015
ABDUL WAHAB JC
30 NOVEMBER 2017

C *Criminal Procedure — Search — Search and seizure — Raiding party from Health Ministry raided medical clinic and adjoining premises on receiving information that clinic employed doctor not registered with Malaysian Medical Council — Whether raiding party committed trespass by entering adjoining premises as it had search warrant only for clinic — Whether clinic's interior*
D *connected/accessible to adjoining premises — Whether raiding party reasonable cause to believe unregistered doctor could be 'hiding' in the adjoining premises — Whether raiding party's actions complied with ss 89 and 90 of the Private Healthcare Facilities and Services Act 1998 ('the Act') — Whether plaintiffs were not entitled to obtain damages caused by raid and seizure — Whether s 89(3)(c) of*
E *the Act empowered an Inspector to detain every person found at the healthcare facility until search was completed — Whether plaintiffs failed to prove they had suffered damages apart from slander — Private Healthcare Facilities and Services Act 1998*

F Armed with a court-issued search warrant, a raiding party and a photographer from the Unit Kawalan Amalan Perubatan Swasta of the Health Ministry ('UKAPS') led by the second defendant ('D2') went to the first plaintiff's premises ('the clinic') to investigate whether the clinic had committed an offence under s 31(1)(c) of the Private Healthcare Facilities and Services Act 1998 ('the Act'). At the material time, the clinic was under the management and charge of the second plaintiff ('P2'), a medical practitioner who was assisted by another certified medical doctor, a trained nurse and several other staff. The defendants contended that UKAPS had received information that the plaintiffs had engaged a doctor ('SP2') who was not registered with the
H Malaysian Medical Council as required under the Act. Although the search warrant only entitled the raiding party to enter the clinic, it also entered and searched the premises adjacent to the clinic ('premise No 4') suspecting that SP2 might be there. The inside of the clinic was connected and accessible to premise No 4. The raiding party seized a number of things from the raided
I premises. An investigation was subsequently carried out and the investigation papers were submitted to the Health Ministry's legal department for further action. No prosecution had yet been instituted at the time of the trial of the instant suit. In the suit, the plaintiffs claimed that the raiding party's entry and search of premise No 4 was unlawful and a trespass and that the entire raid was

done maliciously to damage the plaintiffs' reputation. The plaintiffs sought an order that all materials that were seized by the raiding party be returned in good and working condition, that the defendants publish an apology to the plaintiffs in a Malay-language and an English-language daily newspaper and put on record that the plaintiffs had all the while carried out their trade/profession in accordance with the law. The plaintiffs also sought general, special (for damages caused to various property of the clinic during the search and for loss of income resulting from the clinic having to be shut down for two weeks because of the raid), aggravated and exemplary damages: in particular, damages for defamation and illegal detention of P2. The plaintiffs contended that P2 was detained for about two hours in the clinic's consultation room while the raid was being carried out and that he was also publicly humiliated in front of his staff when D2 allegedly uttered the words 'Doktor penipu' and 'IC tipu' when P2 was handing over his identification card to the raiding officers. P2 also claimed that UKAPS' six hour interrogation of him and four other clinic staff two days after the raid caused him such severe stress and distress that he had to be admitted to hospital suffering from chest pain and palpitation. Inter alia, the defendants contended that the search and seizure was lawful because they had reasonable cause to believe that the plaintiffs had committed an offence under the Act and that the bona fides of their action was not marred in any way by the fact that no prosecution under the Act had yet been initiated against the plaintiffs.

Held, awarding the plaintiffs RM50,000 as damages against D2 for committing slander; rejecting all other claims for damages by the plaintiffs and refusing to order the return of any material that was seized by the defendants during the raid:

- (1) Based on the evidence, the defendants acted in compliance with ss 89 and 90 of the Act and the entry and search done on premise No 4 and the clinic was not unlawful. A search warrant was issued to search the clinic to find the suspected unregistered person, SP2. The clinic was connected and accessible to premise No 4 via a door/extension. There were reasonable grounds for the raiding party to believe that SP2 could be hiding in premise No 4 and that it was urgent to enter and search premise No 4 and that any delay in doing so could defeat the object of the raid and the investigation would be adversely affected. As the search and seizure was lawful, the damages claimed by the plaintiffs as resulting therefrom could not be granted. Furthermore, the plaintiffs failed to adduce any evidence to prove that the defendants had actually caused the damages as claimed (see paras 43 & 89).
- (2) The plaintiffs failed to satisfy the court on balance of probabilities that the raiding party had damaged any of their property. In addition, with regard to the CCTV decoder of the clinic, since the plaintiffs' pleadings did not allege or claim that there was any intentional misconduct

- A committed by the defendants to the CCTV decoder, the court could not consider issues that were not related/relevant to the pleadings (see paras 49 & 65–66).
- B (3) With regard to P2's claim that he was illegally detained by the raiding party, s 89(3)(c) of the Act expressly provided that an Inspector had the power to detain every person found in the healthcare facility or premises until the premises had been searched. As such, the act of detaining P2 and the rest of the employees in the clinic was not an unlawful act done by the raiding party (see para 56).
- C (4) Since there was reasonable and probable cause for the defendants to suspect that the plaintiffs had committed an offence under s 31(1)(c) of the Act, an order that the materials seized by the defendants during the raid be returned to the plaintiffs was refused so that investigations against the plaintiffs were not adversely affected (see para 73).
- D (5) On balance of probabilities, the plaintiffs had satisfied the court that D2 had slandered them. Accordingly, the plaintiffs were awarded RM50,000 against D2 as compensatory damages with interest thereon at 8%pa from the date of judgment until full settlement. The words 'IC tipu' and 'dokter penipu' were, in their ordinary and natural meaning, defamatory and the utterance of such words had the tendency to lower P2's standing in the mind of a reasonable man of average intelligence. Such words would be construed by any reasonable man as an indictment of P2's dishonourable conduct as a medical practitioner. It was the plaintiffs' evidence that at the time the defamatory words were uttered, P2 was the only doctor present in the clinic. Furthermore, the words 'IC tipu' were uttered when P2 handed over his identification card upon D2's request and it was heard by two other persons ie SP3 and SP5. The court did not agree with the defendants' submission that the words 'IC tipu' should not be considered because it was never pleaded by the plaintiffs. The plaintiffs' claim all along was that the search was conducted in a rude and rough manner. Utterance of such derogatory words could not be said to be unrelated or irrelevant in determining the plaintiffs' claim. SP5 was an independent witness to this case and her testimony strengthened the plaintiffs' claim that such derogatory words were in fact used against P2 (see paras 75, 80–81 & 90).
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[Bahasa Malaysia summary]

- I Berbekalkan waran carian yang dikeluarkan oleh mahkamah, satu pasukan serbuan dan seorang jurugambar daripada Unit Kawalan Amalan Perubatan Swasta Kementerian Kesihatan ('UKAPS') diketuai oleh defendan kedua (D2) pergi ke premis plaintif pertama ('klinik') untuk menyiasat sama ada klinik telah melakukan kesalahan di bawah s 31(1)(c) Akta Kemudahan dan Perkhidmatan Pusat Kesihatan Swasta 1988 ('Akta'). Pada waktu material,

klินิก di bawah pentadbiran dan jagaan plaintif kedua ('P2'), seorang pengamal perubatan yang dibantu oleh seorang lagi doktor perubatan beriktiraf, jururawat terlatih dan beberapa pekerja lain. Defendan-defendan berhujah bahawa UKAPS telah menerima maklumat bahawa plaintif-plaintif telah melantik seorang doktor ('SP2') yang tidak berdaftar dengan Majlis Perubatan Malaysia seperti yang dikehendaki di bawah Akta. Walaupun waran geledah hanya membenarkan pasukan serbuan untuk memasuki klinik, ia juga memasuki dan menggeledah premis bersebelahan klinik ('premis No 4') mengesyaki bahawa SP2 mungkin berada di situ. Bahagian dalam klinik adalah bersambung dan boleh dilalui ke premis No 4. Pasukan serbuan merampas beberapa barang daripada premis yang diserbu tersebut. Siasatan kemudiannya telah dijalankan dan laporan siasatan telah diserahkan kepada jabatan undang-undang Kementerian Kesihatan untuk tindakan selanjutnya. Pendakwaan belum dimulakan pada masa perbicaraan guaman ini. Dalam guaman ini, plaintif-plaintif mendakwa bahawa kemasukan dan penggeledahan pasukan serbuan terhadap premis No 4 adalah tidak sah dan satu pencerobohan dan bahawa keseluruhan serbuan dilakukan dengan niat jahat untuk merosakkan reputasi plaintif. Plaintif-plaintif memohon satu perintah bahawa semua material yang dirampas oleh pasukan serbuan dipulangkan dalam keadaan baik dan berfungsi, bahawa defendan-defendan menyiarkan satu permohonan maaf kepada plaintif-plaintif dalam surat khabar harian dalam Bahasa Melayu dan Inggeris dan mengeluarkan rekod bahawa plaintif-plaintif telah pada setiap masa menjalankan perniagaan/profesyen mereka mengikut undang-undang. Plaintif-plaintif juga memohon ganti rugi am, khas (untuk kerosakan yang berlaku kepada beberapa harta klinik sewaktu penggeledahan dan untuk kehilangan mata pencarian apabila klinik ditutup selama dua minggu kerana serbuan tersebut), teruk dan teladan: terutamanya, ganti rugi untuk fitnah dan tahanan salah P2. Plaintif-plaintif berhujah bahawa P2 telah ditahan selama dua jam di bilik rundingan klinik sewaktu serbuan dijalankan dan dia juga telah dihina secara terang-terangan di hadapan pekerjanya apabila D2 dikatakan menyebut perkataan 'Doktor penipu' dan 'IC tipu' apabila P2 sedang menyerahkan kad pengenalan kepada pegawai-pegawai serbuan. P2 juga mendakwa bahawa soal siasat UKAPS terhadapnya selama enam jam dan empat pekerja lain dua hari selepas serbuan menyebabkan stress teruk dan kedukaan sehingga dia terpaksa dimasukkan ke hospital akibat sakit dada dan debaran jantung. Antara lain, defendan-defendan berhujah bahawa carian dan penggeledahan adalah sah kerana mereka mempunyai alasan munasabah untuk mempercayai plaintif-plaintif telah melakukan kesalahan di bawah Akta dan tindakan bona fide mereka tidak dicemari dalam apa-apa cara dengan fakta bahawa tiada pendakwaan di bawah Akta telah dimulakan terhadap plaintif-plaintif.

Diputuskan, mengawardkan plaintif RM50,000 sebagai ganti rugi terhadap D2 kerana melakukan slander, menolak kesemua tuntutan lain-lain bagi ganti rugi oleh plaintif-plaintif dan menolak untuk memerintahkan pemulangan

- A terhadap apa-apa material yang disita oleh defendan-defendan sewaktu serbuan:
- B (1) Berdasarkan keterangan, defendan-defendan bertindak menurut ss 89 dan 90 Akta dan kemasukan dan pengegedahan di premis No 4 dan di klinik tidak menyalahi undang-undang. Satu waran carian telah dikeluarkan untuk mengegedah klinik untuk mencari suspek yang tidak berdaftar, SP2. Klinik adalah bersambung dan terbuka kepada premis No 4 melalui pintu/binaan tambahan. Terdapat alasan-alasan munasabah untuk pasukan serbuan mempercayai bahawa SP2 bersembunyi di dalam premis No 4 dan bahawa ia adalah penting untuk memasuki dan mengegedah premis No 4 dan apa-apa kelewatan dalam berbuat demikian boleh menggagalkan tujuan serbuan dan siasatan akan terjejas dengan teruk. Memandangkan pengegedahan dan penyitaan adalah sah, ganti rugi yang dituntut oleh plaintif-plaintif akibat daripadanya ini tidak dapat diberikan. Tambahan lagi, plaintif-plaintif gagal untuk mengemukakan apa-apa keterangan untuk membuktikan defendan-defendan telah sebenarnya menyebabkan kerosakan seperti didakwa (lihat perenggan 43 & 89).
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- E (2) Plaintif-plaintif gagal untuk memuaskan mahkamah atas imbalan kebarangkalian bahawa pasukan serbuan telah merosakkan mana-mana hartanah mereka. Di samping itu, berkaitan dekoder CCTV klinik, memandangkan pliding plaintif-plaintif tidak mendakwa atau menuntut bahawa terdapat apa-apa salah laku yang disengajakan yang dilakukam oleh defendan-defendan kepada dekoder CCTV tersebut, mahkamah tidak boleh mempertimbangkan isu-isu yang tidak berkait/relevan terhadap pliding (lihat perenggan 49 & 65–66).
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- G (3) Berkaitan dengan tuntutan P2 bahawa dia dihalang secara salah oleh pasukan serbuan, s 89(3)(c) Akta secara terang memperuntukkan bahawa inspektor mempunyai kuasa untuk menahan setiap orang yang didapati dalam tempat atau premis penjagaan kesihatan hingga premis digeledah. Oleh itu, tindakan menahan P2 dan kesemua pekerja di klinik bukanlah tindakan yang menyalahi undang-undang yang dilakukan oleh pasukan serbuan (lihat perenggan 56).
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- I (4) Memandangkan terdapat sebab yang munasabah dan wajar untuk defendan-defendan mengesyaki bahawa plaintif-plaintif telah melakukan kesalahan di bawah s 31(1)(c) Akta, satu perintah bahawa material yang disita oleh defendan-defendan sewaktu serbuan dipulangkan kepada plaintif ditolak agar siasatan terhadap plaintif-plaintif tidak terjejas dengan teruk (lihat perenggan 73).
- (5) Atas imbalan kebarangkalian, plaintif-plaintif telah memuaskan mahkamah bahawa D2 telah memfitnah mereka. Sewajarnya, plaintif-plaintif diawardkan RM50,000 terhadap D2 sebagai pampasan

ganti rugi dengan faedah seterusnya pada 8% setiap tahun dari tarikh penghakiman sehingga penyelesaian penuh. Perkataan 'IC tipu' dan 'dokter penipu' adalah, dalam maksud biasa dan asal mereka, bersifat fitnah dan sebutan perkataan-perkataan sebegini mempunyai kecenderungan untuk merendahkan kedudukan P2 dalam minda orang munasabah yang mempunyai intelek sederhana. Perkataan-perkataan sebegini boleh ditafsirkan oleh mana-mana orang munasabah sebagai dakwaan kelakuan keji P2 sebagai pengamal perubatan. Adalah keterangan plaintif-plaintif bahawa pada masa perkataan fitnah disebut, P2 adalah satu-satunya doktor yang berada di klinik tersebut. Tambahan lagi, perkataan 'IC tipu' telah disebut apabila P2 menyerahkan kad pengenalan atas permintaan D2 dan ia didengari oleh dua orang yang lain iaitu SP3 dan SP5. Mahkamah tidak bersetuju dengan hujahan defendan-defendan bahawa perkataan 'IC tipu' tidak sepatutnya dipertimbangkan kerana ia tidak pernah diplidkan oleh plaintif. Dakwaan plaintif-plaintif pada kesemua masa adalah bahawa carian telah dilakukan secara biadap dan kasar. Sebutan perkataan menghina tidak boleh dikatakan tidak berkaitan atau tidak relevan dalam menentukan dakwaan plaintif-plaintif. SP5 adalah saksi bebas terhadap kes ini dan testimoninya mengukuhkan dakwaan plaintif-plaintif bahawa perkataan menghina sebegini sememangnya digunakan terhadap P2 (lihat perenggan 75, 80–81 & 90).]

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Notes

For a case on search and seizure, see 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 4013.

F

Cases referred to

1 Rise (M) Sdn Bhd v Inspektor, Kementerian Kesihatan Malaysia & Anor [2015] 9 MLJ 471; [2015] 1 CLJ 100, HC (refd)

G

Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315, HC (refd)

Bank Bumiputra Malaysia Berhad v First Circle Rubber Products Sdn Bhd [2004] 7 MLJ 168; [2004] 1 LNS 267, HC (refd)

Bonham-Carter v Hyde Park Hotel Ltd [1948] 64 TLR 177, KBD (refd)

Buncho (M) Sdn Bhd v Q-Stationers Sdn Bhd [2009] MLJU 1866; [2010] 7 CLJ 359, HC (refd)

H

China Road & Bridge Corp & Anor v DCX Technologies Sdn Bhd and another appeal [2014] 5 MLJ 1, CA (refd)

Datuk Mohd Ali bin Hj Abdul Majid & Anor (both practising as Messrs Mohd Ali & Co) v Public Bank Bhd [2014] 4 MLJ 465; [2014] 6 CLJ 269, FC (folld)

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Davies (AP) (suing as widow and administratrix of the estate of Kenneth Stanley Davies, decd) v Taylor [1974] AC 207, HL (refd)

Ismail bin Shamsudin v Abdul Aziz bin Abdan and other suits [2007] 3 MLJ 512; [2007] 8 CLJ 65, HC (refd)

- A *Kian Lup Construction v Hong Kong Bank Malaysia Bhd* [2002] 7 MLJ 283;
[2002] 7 CLJ 32, HC (refd)
Lim Kar Bee v Abdul Latif bin Ismail [1978] 1 MLJ 109, FC (refd)
Recaliva Design Steel (M) Sdn Bhd v Vista Access Sdn Bhd [2008] 6 MLJ 604;
[2008] 10 CLJ 491, HC (refd)
- B *S-B (Children) (Care Proceedings: Standard of Proof), In re* [2010] 1 AC 678,
SC (refd)
*Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin &
Ors* [1994] 3 MLJ 185, SC (refd)
- C *Wong Swee Chin v PP* [1981] 1 MLJ 212, FC (refd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152, SC (refd)

Legislation referred to

- Private Healthcare Facilities and Services Act 1998 ss 31(1)(c), 89, 89(3)(c),
90, 95, 96
- D *Shamsul (Nisha with him) (Presgrave & Matthews) for the plaintiffs.*
*Rahazlan Affandi Abdul Rahim (Senior Federal Counsel, Pulau Pinang State
Legal Advisor's Office) for the defendants.*

E **Abdul Wahab JC:**

INTRODUCTION

- F [1] The first plaintiff is a polyclinic with the registered address at No 6
Lorong Perda Utama 1, Bandar Perda, 14000 Bukit Mertajam, Pulau Pinang
under the management of the second plaintiff, Dr Abdullah Zawawi bin Hj
Samsudin ('SP1'), whom is a medical practitioner since 1993 and is the person
in charge at Poliklinik Bakti Anz Sdn Bhd ('the clinic') with the assistance of a
G certified medical doctor, a trained nurse and several other staff.
- H [2] The plaintiffs claim was premised upon an unlawful entry by the raiding
party into the adjacent property of the polyclinic with registered address No 4,
Lorong Perda Utama 1, Bandar Perda, 14000 Bukit Mertajam, Seberang Perai,
Pulau Pinang which was under construction and renovation ('premise No 4').
- I [3] The plaintiffs further based its claim on the allegation that the said search
was conducted with malice intending to cause damage to the plaintiffs'
reputation. The plaintiffs further claimed that the defendants had committed
defamatory act against the plaintiffs.
- [4] As a result of the above allegations, the plaintiffs had therefore filed an
action against the defendants and sought for the following reliefs from this
court:

- (i) an order that things and/or documents seized on 16 February 2015 as listed in the list of things seized Act 586 be returned to the plaintiffs in good and working condition one week from the date of judgment and/or order made by this court; A
- (ii) an order that the defendants make an apology statement and/or announcement in the form of a printed media of a Malay language daily newspaper namely *Utusan Malaysia* and an English language daily newspaper namely *The Star* on the first page of each newspaper one week from the date of judgment and/or order made by this court stating that the plaintiffs had at the material time operated accordingly with all licenses and approval which are mandatory and required by the relevant authority that is the Ministry of Health of Malaysia; B
- (iii) an order for general damages, to be assessed by this court, for defamation and illegal detention be paid by the defendants to the plaintiffs; C
- (iv) an order that specific damages for the sum of RM371,364.79 be paid by the defendants to the plaintiffs; D
- (v) an order for aggravated damages and damages to be paid by the defendants to the plaintiffs; E
- (vi) an order for exemplary damages and damages to be paid by the defendants to the plaintiffs; F
- (vii) interest for the sum of damages at paras (iii), (iv), (v) and (vi) above, at such rate and period of time as this court deems fit and proper to grant, to be paid by the defendants to the plaintiffs; F
- (viii) costs; and
- (ix) such further and other reliefs as this court deems fit and proper to grant.

BACKGROUND FACTS

[5] Pursuant to a search warrant dated 16 February 2015 ('search warrant'), a raiding team from Unit Kawalan Amalan Perubatan Swasta Kementerian Kesihatan Malaysia (UKAPS) led by the second defendant (SD1) Dr Haslina bt Zamani together with four members of the raid and a photographer (SD2) went to the Clinic. Members of the raiding team had also entered into the adjacent property with registered address No 4, Lorong Perda Utama 1, Bandar Perda, 14000 Bukit Mertajam, Seberang Perai, Pulau Pinang which was under construction and renovation ('premise No 4').

[6] The defendants claimed that the raid was made pursuant to the public complaint/information and intelligence (*risikan*) of the UKAPS, Penang that the clinic was suspected of committing an offence under s 31(1)(c) of the Private Healthcare Facilities and Services Act 1998 ('Act 586').

- A** [7] In compliance to s 95 of Act 586, the raiding party had made a list of things seized ('search list') which was signed by SD1 and SP1 witnessed by the plaintiffs' staff Habibah bt Abdul Said and Dr Sarie Idhadhyhu (SD5) both of whom also put their signatures as witnesses on the search list. It was however the plaintiff's contention that the said search list was signed by him unwillingly.
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- C** [8] Amongst things seized by the raiding party during the said raid was a unit of CCTV decoder. However, the CCTV recording was not able to be extracted from the CCTV decoder and a report dated 29 May 2015 was prepared by the Cyber Security Malaysia with regard to this matter.
- [9] Subsequent to the raid, SD1 had also made a police report in relation to the search and seizure conducted on the clinic dated 16 February 2015.
- D** [10] An investigation was done by the Investigation Officer Norhafiza bt Othman ('SD6') under s 31(1)(c) of Act 586 and an investigation paper was opened in accordance with said section and it was then submitted to Bahagian Perundangan, Kementerian Kesihatan Malaysia and its status is still pending instruction.
- E**
- F** [11] The plaintiffs alleged that the raiding party had caused damages to several medical machines, trolleys and patient bed, patients' storage space and several new and unused x-ray films. The plaintiffs claimed that the said damages had caused the plaintiffs to suffer damages and loss of income as follows:
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- (a) one unit of 4D 'probe' for SIUI 4D Ultrasound RM 65,000;
Probe
 - (b) CPU and audio board for cardiovascular system RM135,000;
 - (c) patients' storage space RM 660;
 - (d) damages to x-ray films RM 400; and
 - (e) loss of income consequence to inability or unusable 4D ultrasound probe machine. Average of five patients a day requiring the use of the said machine at an estimated cost of RM80 to be charged for each patient. Therefore, loss of income estimated is as follows:
5 person(s) x 140 day(s) (from 16 February 2015 until the date of filing of this action and continuing) x RM80 = RM56,000
- H**
- I** [12] The plaintiff also claimed that the second plaintiff after having introduced himself and producing his identity card was held by two members of the raiding party and was detained in the consultation room for about two hours. The plaintiffs further claimed that the employees of the clinic were rudely treated and were not allowed to take any photo and/or video to record the conduct of the search.

[13] It was also the plaintiffs allegation that the second defendant had uttered the word 'Doktor penipu!' on her way out of the clinic after having conducted the search which the plaintiffs understood to mean and/or to bring about the meaning as follows:

- (a) that the second plaintiff had practiced without certificates and/or license and/or identity card as approved and/or recognised by the authorities;
- (b) that the second plaintiff does not possess the proper qualifications to practice as a doctor and/or medical practitioner;
- (c) that the second plaintiff had exercised his medical practices unethically and non-integrity; and
- (d) that the second plaintiff had used the first plaintiff as a tool to exercise illegal medical practices and/or with the intent to cheat and/or deceive the public.

[14] The plaintiffs claimed that the statement made by the second defendant was heard by the clinic's staff. The plaintiffs claimed that the statement made was untrue and was made with malice intent, defamatory and was intended to embarrass the second plaintiff. As a result, the plaintiffs reputation and good name had been tarnished.

[15] A press statement was conducted by an NGO on 17 February 2015 wherein SP1 was questioned about the raid done on the clinic. In response to the said press statement, a press statement was made by the director general of the first defendant, Datuk Noor Hisham Abdullah on 23 February 2015 with regard to the ongoing investigation of the plaintiffs under Act 586. The plaintiffs claimed that the press statement made on 23 February 2015 had further exacerbated the plaintiffs' reputation in public's eyes especially the second plaintiff who was a former parliamentary candidate for BEBAS Parlimen Permatang Pauh at the 13th General Election, the Secretary-General of the Medical Practitioners Coalition Association of Malaysia (MPCAM) and an international investment consultant based on Hong Kong through the Rising Earn Ltd (HK).

[16] Consequence to the raid and/or search done and the said press statement, the plaintiffs claimed that the second plaintiff had to withdraw from participating in the Permatang Pauh Parliament by-election in the month of April 2015 and did not contest for the post as Secretary-General of MPCAM in the month of March 2015.

[17] SP1 had also made three police reports in respect of the raid each dated 16 February 2015, 27 February 2015 and 24 March 2015.

A [18] The plaintiffs further claimed that the second plaintiff together with four other staff members were required to be present at UKAPS, Tingkat 37, KOMTAR on 18 February 2015 at 9am for interrogation purposes which lasted for a period of six hours without any breaks for rest, dining and/or prayer. The plaintiffs claimed that as result of the above events, the second plaintiff had suffered great pressure and was admitted into Lam Wah Ee Hospital on 22 February 2015 as a result of chest pain and palpitation. Doctor Barakath Kareem from the said hospital confirmed that the secpnd plaintiff had a rising and/or elevated troponin level indicating a heart attack. The second plaintiff had incurred the cost of treatment for the sum of RM4,995.

C [19] The plaintiffs claimed that the first plaintiff had suffered further losses as a result of the search conducted on 16 February 2015 on the ground that there was no data of patients and medicine stocks, hence the said clinic was not able to operate and had to be shut down for a period of two weeks from 16 February–2 March 2015 in order for plaintiffs to manually calculate the medicine stocks, to replace the formal receipt book etc before the said clinic could resume its operation. Details of losses suffered claimed by the plaintiffs as follows:

- E (a) average patients' attendance at 120 a day with an average minimum charge for each patient at RM13.76 calculated as follows:
 $120 \times \text{RM}13.76 \times 15 \text{ days} = \text{RM}24,768;$
- F (b) salary for eight employees of the clinic including the second plaintiff for the closure period of the clinic amounting to RM16,815.22;
- (c) total expenses of RM1,600 incurred by the first plaintiff and its' staff for their attendance to UKAPS; and
- (d) the clinic rental cost for the period of 15 days at RM1,178.57.

G [20] The plaintiffs alleged that the first plaintiff had suffered further losses when the first plaintiff's health services had been suspended by FOMEMA for two weeks and when the Delta Force Security Services & Consultancy Sdn Bhd had terminated it as the panel clinic on 4 March 2015. Details of losses calculated as follows.

H Average patients attendance from amongst foreign workers at 20 person a day and an average minimum charges at RM85 per patient. As a result of loss suffered from the said suspension by FOMEMA as follows:

I $20 \times \text{RM}85 \times 14 \text{ hari} = \text{RM}23,800.$

[21] The plaintiffs claimed that the second plaintiff had repeatedly made written requests for the things and documents seized to be returned, especially

the data of patients and medicine stocks as contained in the hard disc Gluco Clinic Computer System. Deprivation of patients' data and medicine stocks had, as claimed by the plaintiffs, disrupted and affected the operation of the clinic to the extent that the plaintiffs had to incur great expense in replacing the software system and hard disk and terminals cum CCTV system.

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[22] The plaintiffs had also, through their solicitor, issued a notice of demand dated 8 May 2015 to the defendants. The defendants had however failed and/or refused and/or neglected to return the things and documents seized and had also failed to comply with and/or reply and/or revert to the notice of demand.

C

THE PLAINTIFFS' SUBMISSION

[23] The plaintiffs submitted that the raiding party had exceeded the power conferred upon them by the search warrant when they had unlawfully entered into the premise No 4 which was adjacent to the clinic as on the ground that the search warrant issued was only for search to be done on the clinic and not premise No 4.

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[24] It was therefore the plaintiffs' submission that the raid and search conducted on premise No 4 without a valid search warrant and without the consent of the second defendant was in excess of the powers conferred by the search warrant issued by the court and was therefore invalid. The plaintiffs contended that the raid and search done on premise No 4 was tantamount to an action of trespass. The plaintiffs claimed that this fact was clear as there was a barrier placed between the clinic and premise No 4 to differentiate the two premises and to block access between the two premises as premise No 4 was, at the material time, under the process of renovation.

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[25] The plaintiffs submitted that the conduct of raid and search at the clinic was done in a rude and rough manner and with malice intent. This allegation, as submitted by the plaintiffs, was supported by evidences of witnesses' testimony at trial particularly SP1, SP3 and SP5. The plaintiff submitted that the said raid and search done had the effect of subjecting the plaintiffs to public opinion that the plaintiffs had committed an unlawful act.

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[26] It was the plaintiffs' further submission that the ground of suspect on which raid and search conducted that the plaintiffs had engaged an unregistered person to work as a medical practitioner in the clinic was not maintainable as the defendants had failed to provide any source of complaints which had led to the said conduct of raid and search. The plaintiffs had further through SP1 given evidence at trial that he was not informed of the purpose of the said raid and search.

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- A [27] The plaintiffs submitted that the utterance of the work ‘Doktor Penipu’ by the second defendant, as alleged by the plaintiffs, was made with malice intent, defamatory and was intended to shame the second plaintiff in the public’s eyes.
- B [28] With regard to the issue of illegal detention as alleged by the plaintiffs, it was submitted that, in view of the illegal detention and the defamatory words used against the second plaintiff, the second plaintiff shall be entitled to general damages, exemplary and aggravated damages. The plaintiffs contended that
- C the award of RM10,000 for illegal detention and RM500,000 for defamation were reasonable compensations taking into account his position as a public figure with reputation as former Permatang Pauh parliamentary candidate and the Secretary of MPCAM.
- D THE DEFENDANTS’ SUBMISSION
- E [29] The defendants contended that despite serious allegations of the defendants’ misconduct/wrongful acts and of substantial losses suffered by the plaintiffs, the details of what allegedly transpired were neither reflected in SP1’s police report made on the same day nor in the second police report made 11 days after the raid. Thus, it is prudent and highly probable to conclude that the plaintiffs’ version was concocted, fictitious and mala fide. It was therefore the defendant’s submission that the details of what allegedly transpired as per the police reports should have been made shortly after the raid or at least within
- F a reasonable period when the facts were still fresh in SP1’s mind and not after one month and eight days of the raid.
- G [30] The defendants in contending that the said search and seizure was lawful relied on the provisions under ss 89 and 90 of Act 586. The defendants submitted that for the purpose of raid, search and seizure, the test is reasonable and probable cause and not whether there was a prima facie case that an offence under the Act was in fact committed by the plaintiffs.
- H [31] The defendants also submitted that there was no specific time frame for the institution of the criminal charge against any accused and it is beyond the control of the defendants as the prerogative power regarding the institution of any charge lies with the prerogative powers of the public prosecutor (attorney general) which cannot be usurped by the court. As such, it was the defendants
- I submission that albeit the absence of any criminal prosecution instituted against the plaintiffs for offence of which the plaintiffs was suspected of committing, it does not necessarily mean that the search and seizure were not bona fide conducted and that there was no reasonable and probable cause for the raid.

[32] The defendants had disagreed on the issue of illegal detention by the raiding party and it was the defendants' pleaded stance that SP1 was free to move around and that the raiding party was accompanied by the staffs of the clinic during the inspection. It was further submitted by the defendants that pursuant to s 89(3)(c) of Act 586, an inspector is empowered to detain every person found in the healthcare facility or premises until the facility or premises have been searched.

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[33] The defendants further contended that the content of the press statement made on 23 February 2015 never concluded that the offence was in fact committed by the first plaintiffs. It was therefore submitted by the defendants that the said press statement was not mala fide and did not defame the plaintiffs and that it was made in response to the second plaintiff's earlier press statement made on 17 February 2015.

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FINDINGS OF THIS COURT

[34] In view of the facts of the present case and issues raised by the parties before this court, I shall proceed to determine the issues as raised in the following order:

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- (a) whether the entry, search and seizure done was lawful;
- (b) whether the raiding party had caused damages to the plaintiffs' properties as a result of the raid conducted;
- (c) whether the second plaintiff had been illegally detained by the raiding party;
- (d) whether things seized ought to be returned to the plaintiffs;
- (e) whether the defendants had committed defamation action against the plaintiffs; and
- (f) whether the plaintiffs are entitled to damages sought.

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WHETHER ENTRY, SEARCH AND SEIZURE LAWFUL

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[35] It was the plaintiffs' pleaded case that the raid and search conducted on the clinic was done in a rough manner, with malice intent and that the raiding party had exceeded the power conferred by the search warrant when they had entered and searched the premise No 4 which was located adjacent to the clinic.

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[36] It is an undisputed fact that premise No 4 and the clinic are two different premises bearing different registration addresses with different signboards. A search warrant had been issued on 16 February 2015 for a search to be conducted on the clinic. It was the plaintiff's contention that the said

- A** search warrant does not authorize the search to be conducted on premise No 4 as such search done on the said premise by the raiding party amounted to trespass.
- B** [37] On this point, reference is made to s 89 of the Private Healthcare Facilities and Services Act 1998 ('Act 586') which provides as follows:
- Section 89 Power to search and seize.
- (1) If it appears to a Magistrate upon written information on oath and after such enquiry as he considers necessary that there is reasonable cause to believe that —
- C** (a) any private healthcare facility or premises has been used or is about to be used for; or
- (b) there is in any private healthcare facility or premises evidence necessary to establish, the commission of an offence under this Act, the Magistrate may
- D** issue a search warrant in respect of such facility or premises to an Inspector.
- (2) An Inspector to whom a search warrant has been issued under subsection (1) may, at any time by day or by night and with or without assistance —
- E** (a) enter the private healthcare facility or premises, if need be by force; and
- (b) search the private healthcare facility or premises for and seize, and remove from the facility or premises, any book, record, document, apparatus, equipment, instrument, material, article, sample, blood, blood product, human tissue or fluid or any product of the human body, dialysate,
- F** chemical, pharmaceutical, substance or any other thing —
- (i) in respect of which an offence has been committed;
- (ii) in respect of which an offence is suspected to have been committed; or
- G** (iii) that is reasonably believed to furnish evidence of the commission of the offence.
- (3) An Inspector may —
- H** (a) break open any outer or inner door of any healthcare facility or premises, or any fence, enclosure, gate or other obstruction to the healthcare facility or premises, in order to effect entry there into;
- (b) remove by force any obstruction to entry, search, seizure or removal as he is empowered to effect under subsection (2);
- I** (c) detain every person found in the healthcare facility or premises until the facility or premises have been searched;
- (d) in the case of a mobile healthcare facility or premises, seize such healthcare facility or premises;

- (e) place any book, record, document, apparatus, equipment, instrument, material, article, sample, blood, blood product, human tissue or fluid or any product of the human body, dialysate, chemical, pharmaceutical, substance or other thing, in a container; A
- (f) where any book, record, document, apparatus, equipment, instrument, material, article, sample, blood or blood product, human tissue or fluid or any product of the human body, dialysate, chemical, pharmaceutical, substance or other thing referred to in paragraph (e) has been seized on any private healthcare facility or premises entered into in accordance with section 88 or 89, place the book, record, document, apparatus, equipment, instrument, material, article, sample, blood, blood product, human tissue or fluid or any product of the human body, dialysate, chemical, pharmaceutical, substance or other thing in a room, compartment or cabinet located on that private healthcare facility or premises; B
C
- (g) mark, fasten and seal the container referred to in paragraph (e) or, as the case may be, the door or opening providing access to the room, compartment or cabinet referred to in paragraph (f). D

[38] Section 89 imposes an obligation on the health officer to obtain judicial authorisation for the search by obtaining a warrant to enter the private property for the purpose of search. The validity of such a warrant is necessarily dependent upon the fulfilment of the conditions governing its issue. E

[39] Section 90 of Act 586 further provides for the power of an inspector to exercise its power provided under s 89 to search and seize without warrant where there is reasonable cause to believe that by reason of delay in obtaining a search warrant under s 89: (a) the investigation would be adversely affected; (b) the object of the entry is likely to be frustrated; (c) the book, record, document, apparatus, equipment, instrument, material, article, sample, blood, blood product, human tissue or fluid or any product of the human body, dialysate, chemical, pharmaceutical, substance or other thing sought may be removed or interfered with; or (d) the evidence sought may be tampered with or destroyed. F
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[40] Reference is made to the case of *1 Rise (M) Sdn Bhd v Inspektor, Kementerian Kesihatan Malaysia & Anor* [2015] 9 MLJ 471; [2015] 1 CLJ 100 where the court in considering the meaning of ‘reasonable cause to believe’ had referred to two other cases as follows: H

[18] It would be useful to refer to two cases where the meaning of the phrase ‘reasonable cause to suspect’ was considered. In *Chia Sia Chek v Ketua Pengarah Kastam, Jabatan Kastam Diraja Malaysia & Ors* [2009] 7 MLJ 609; [2009] 2 CLJ 286, Zamani A Rahim JC (as he then was) declared the seizure of a motorcar under the Customs Act 1967 invalid on the ground that the customs officers had no I

A reasonable cause to suspect at the time of the seizure, that the plaintiff's motorcar came within the definition of 'uncustomed goods' as provided in the Act. In his judgment, he said:

B [10] In this case, it has not been shown the relevant circumstances where reasonable grounds of suspicion had arisen to suspect that the repaired Honda/plaintiff's motorcar was uncustomed goods. In his affidavit in reply, one Md Naeyem bin Abdul Mutalib, Penguasa Kastam, Jabatan Kastam Diraja Malaysia, Bahagian Pencegahan, Sungai Petani affirmed on 21 August 2006 at para 6 states, inter alia:

C ...

D [12] It was unclear whether Md Naeyem bin Abdul Mutalib was the custom officer who possessed reasonable grounds that the repaired Honda/plaintiff's motorcar was uncustomed goods and seized it. Nowhere in his affidavit evidence and the exhibits annexed thereto to show circumstances to trigger reasonable cause or reason to suspect that the repaired Honda/plaintiff's motorcar was uncustomed goods, an offence committed under the Customs Act or any regulation made thereunder. *The reasonable cause of suspicion must exist before or at the time seizure is effected.* In the absence of such reasonable cause, the seizure and detention of the repaired Honda/plaintiff's motorcar is therefore unlawful, contrary to art 13(1) of the Federal Constitution which provides as follows: No person shall be deprived of property save in accordance with law.

E [19] The same view was echoed by Harminder Singh JC (as he then was) in *Loh Kam Hon v Ketua Pengarah Kastam Diraja Malaysia* [2012] 2 MLJ 682. He observed:

F It is trite law that the 'reasonable cause to suspect' provided under s 114(1) of the Act must exist before or at the time of seizure of the said vehicle and not anytime after the seizure (see also *Chia Sia Chek v Ketua Pengarah Kastam, Jabatan Kastam Diraja Malaysia & Ors* [2009] 7 MLJ 609; [2009] 6 AMR 149). It would also follow that in the absence of that reasonable cause prior to or at the time of detention and seizure, that seizure would become unlawful, null and void. It would be a violation of art 13(1) of the Federal Constitution which states 'No person shall be deprived of property save in accordance with the law'.

G [20] In my view, the phrase 'reasonable cause to believe' in s 90 of the Act must be given a similar construction. This means that a health officer who makes a decision to enter and search a private property under s 90, must have reasonable cause to believe, prior or at the time of entry, that if the search was delayed, material evidence would be destroyed or tampered with. (Emphasis added.)

H [41] Bearing the above principle in mind, I now turn to the facts of this case as elicited before me. It must first be noted that a search warrant had in fact been issued on 16 February 2015 for a search to be conducted on the clinic on the ground of suspicion that an offence under Act 586 had been committed by the plaintiffs. The defendants contended that based on the information extracted from public complaint and intelligence of UKAPS, the plaintiffs had

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engaged a doctor by the name of Huzainol Hisham bin Hussain ('SP2') whom was not registered with the Malaysian Medical Council as required under s 31(1)(c) of Act 586. The unregistered status of SP2 was confirmed by the Malaysian Medical Council by way of a letter dated 24 March 2015. As such, it was the defendants' pleaded defence that the purpose of the said search was to ensure that the plaintiffs had acted in compliance to the said section.

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[42] It was the second defendant's ('SD1') testimony at trial that she did not obtain any search warrant for premise No 4 because if she was to obtain prior warrant, it would cause delay for her to get evidence and that it would affect the investigation. She further stated that she had went on to inspect premise No 4 without a search warrant as she suspected that there was a possibility that the unregistered medical practitioner was in premise No 4, in view that there was an extension or door from the internal part of the clinic to premise No 4. The said connection between the premise No 4 and the clinic was also affirmed by SP1 and SP3.

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[43] Based on the evidence adduced before me, I am of the considered view that the defendants had acted in compliance with ss 89 and 90 of Act 586 and that the entry and search done on premise No 4 and the clinic was not unlawful for the following reasons:

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- (a) a search warrant had been issued for the search of the clinic on 16 February 2015 which was enforced by the raiding party on the same date;
- (b) the objective of the search was to find the suspected unregistered person, SP2;
- (c) both premises were connected and premise No 4 was accessible as there was an extension or door from the internal part of the clinic to premise No 4;
- (d) there were reasonable grounds for the raiding party to believe that SP2 could be hiding in premise No 4 in view that SP2 was not present in the clinic; and
- (e) there were reasonable grounds to believe that entry into premise No 4 was on an urgent basis and that any delay by the defendants in carrying out entry and search on premise No 4 could defeat the object of entry and that the investigation would be adversely affected.

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WHETHER THE RAIDING PARTY HAD CAUSED DAMAGES TO PROPERTIES PLACED IN PREMISE NO 4

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[44] It was the plaintiffs claim that the raiding party had conducted the search in a rough manner thereby causing damages to several medical

A machines/equipment, scratches to the trolley and patient's bed, damage to the storage of patient's goods and they also opened up a covered box containing new 100 pieces of x-ray films which became damaged after being exposed to the light all of which were placed in premise No 4.

B [45] It was undisputed by the parties that premise No 4 was undergoing renovation which was affirmed by SP1, SP3 and SP4. SP4 had however in his oral testimony stated that the renovation work was at 98% completion when he inspected premise No 4 on 17 February 2015. It was however SP1's and SP3's
C testimony at trial stating that there were still a number of renovation equipment in premise No 4 when the raid was conducted. It was SP4's testimony at trial stating that the medical machines are of sensitive nature and that such machines could be damaged due to too much movement, however, the plaintiffs had placed the said machines in premise No 4 which was
D undergoing renovation.

[46] SP1, SP3 and SP5 stated in their oral testimony at trial that during the raid conducted on premise No 4, they had heard a loud noise as if something had fallen. SP1 had in his oral testimony stated that it was the loud noise he
E heard which had made him got up from his chair to check but was however apprehended by two members of the raiding party. Despite such allegation, neither SP2 and SP3 had taken necessary steps to check on the possibility of any damage that may be caused by the defendants immediately after the raiding party had left the premise.
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[47] Although the plaintiffs had pressed on the issue that they were not allowed to take pictures and/or record video of the raid process; no pictures were however taken by SP2, SP3 and/or any other employees of the clinic to show that the clinic was in a mess after the raiding party had left the premise.
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[48] In order to succeed in its claim for damages, the onus is on the plaintiffs to prove that the raiding parties had caused damages as claimed. The principal fact or *factum probandum* may be proved indirectly by means of certain inferences drawn from *factum probans* ie the evidentiary facts. To put it differently, circumstantial evidence is not direct to the point in issue, but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together, they form a chain of circumstances from which the existence of the principal act can be legally inferred or presumed
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I (*Woodroffe and Amir Ali* (Vol 2) at p 2236). Application of the balance of probabilities comes down to whether it is more likely than not that an event had taken place (see *In re S-B (Children) (Care Proceedings: Standard of Proof)* [2010] 1 AC 678; *Davies (AP) (suing as widow and administratrix of the estate of Kenneth Stanley Davies, decd) v Taylor* [1974] AC 207).

[49] Having considered the totality of evidence adduced, it is in my considered view that the plaintiffs had failed to satisfy this court on the balance of probabilities that the raiding party had caused damages to the plaintiffs' property.

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WHETHER OR NOT THE SECOND PLAINTIFF HAD BEEN ILLEGALLY DETAINED BY THE RAIDING PARTY

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[50] It was the plaintiffs' submission that the raid was rudely done and that SP1 was held by two members of the raiding party and was detained in the consultation room for one and half hour. SP3 in her witness statement (Q&A 10 and 11) stated that since the door of the consultation room was opened, she saw that two members of the raiding party hold SP1 and at that time she was at the registry of the clinic and was not allowed to move around.

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[51] The defendants had disputed SP3's evidence stating that SP3's evidence was not credible as it was impossible for her to see that SP1 was held by the members of the raiding party in the consultation room for the following reasons:

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- (a) that each door of the consultation room and registration room was not facing to each other but rather situated side by side;
- (b) that based on the sketch plan provided there was no connecting door from the dispensary and registration room to the consultation room;
- (c) as testified by SP5, since the plaintiffs' staffs were allegedly assembling in the registration room and not allowed to go out from the room, it would be impossible for SP3 to see what actually happened in the consultation room; and
- (d) apart from a door which was connected to the emergency and minor surgery room from the consultation room, there were walls which would bar any vision from the dispensary and registration rooms to the consultation room.

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[52] The plaintiffs had however contended that SP3's vision being barred by the walls separating each room was based purely on the defendants' assumption and that neither SP1 nor SP3 was cross-examined on the sketch plan as adduced before this court hence it was the plaintiffs' submission that the defendants is estopped from raising this issue in submission.

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[53] I would like to first emphasis on the general principle that failure to cross-examine on vital issues may on the facts of the case be deemed to be accepted unless there are other compelling evidence to say otherwise (see *China Road & Bridge Corp & Anor v DCX Technologies Sdn Bhd and another appeal*

A [2014] 5 MLJ 1). This trite law principle was expressed in the case of *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 as follows:

On this point we need only to say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony.

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[54] Reference is also made to the case of *Buncho (M) Sdn Bhd v Q-Stationers Sdn Bhd* [2009] MLJU 1866; [2010] 7 CLJ 359, where Hamid Sultan bin Abu Backer JC sitting in the High Court, had this to say:

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(d) The plaintiff's argument on these issues that the defendant failed to cross-examine PW1 on the design is fatal and has no merits. And relies on the Court of Appeal decision in *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639 where it was stated:

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It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case ...

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The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is a rule of essential justice ... if he asks no question with regard to this, then he must be taken to accept the plaintiffs' account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he finished the evidence of his witness and when he has no further chance to meet the new case made which was never put and secondly, because subsequent testimony has no chance to be tested and corroborated.

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The words echoed by the Court of Appeal have its roots in *Sarkar on Evidence* (14th Ed) p 2006, which reads as follows:

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Effect of omitting or not cross-examining a witness on essential points. The skilful cross-examiner must hear the statements in examination-in-chief with attention, and when his turn comes, he should interrogate the witness on all material points that go against him. If he omits or ignores them, they may be taken as an acceptance of the truth of that part of witness's evidence. Generally speaking, when cross-examining, a party's counsel should put to each of his opponent's witnesses, in turn, so much of his own case as concerns that particular witness or in which he had a share. Thus, if a witness speaks about a conversation, the cross-examining lawyer must indicate by his examination how much of the witness's version of it he accepts and how much he disputes, and to suggest his own version. If he asks no questions, he will be taken to accept the witness's account (*Flanagan v Fahy* [1918] 2 IR 361, 388–89 (CA); *Browne v Dunn*, *infra*; see *Odgers' Pleading*, 13th Ed p 261; *Powell* 9th Ed p 531; *Wig Vol 2* para 1371; *Phipson*, 11th Ed p 649; see also *Chunilal v HF Ins Co, A* [1958] Pu 440; *Babulal v Caltex (India) Ltd, A* [1967] C 205). Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the

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testimony given could not be disputed at all. It is wrong to think that is merely a technical rule of evidence. It is a rule of essential justice (*Carapiet v Derderiem, A* [1961] C 359. In this case PB Mukharji J, relied on and quoted the observations of Lords Herschell And Halsbury in *Browne v Dunn*, 6 R 67, 76-7, reproduced under s 146 post under heading: 'Testing veracity and impeaching credit'; *S v Bhola*, A 1969 Raj 220). Therefore *an omission or neglect to challenge the evidence in chief on a material or essential point by cross-examination, would lead to the inference that the evidence is accepted, subject of course to its being assailed as inherently incredible or palpably untrue* (see *Sachindra v Nilima, A* [1970] C 38, 63) ... Where however, several witnesses are called to prove the same point, it is not always necessary that they should all be cross-examined.

Failure to cross-examine, however, will not always amount to an acceptance of the witness's testimony, eg if the witness has had notice to the contrary beforehand, or the story is itself of an incredible or romancing character [*Browne v Dunn*, sup; (quoted in *Sukhrabi v STC, A* [1966] C 620)] or the abstention arises from mere motives of delicacy, as where young children are called as witnesses for their parents in divorce cases, or when counsel indicates that he is merely abstaining for convenience, eg to save time (*Phip* 11th Ed p 649).

What was stated in *Aik Ming* must not be quoted as a naked and bare statement of the law. Apex proposition must always be seen to be clothed with the law etc. It is trite that the legal burden is on the plaintiff or defendants as the case may be to establish each and every element necessary to succeed in their pleadings (see s 101 of Evidence Act 1950). The rules of pleading as to joinder of issue are also relevant when dealing with the proposition stated in *Aik Ming*. *Aik Ming* does not propose to write off the law relating to burden of proof or rules of pleadings. There can be no surprises when the law and rules of pleadings places the burden on the parties to establish the case. The principles stated in *Aik Ming* is the replica of what was adumbrated by *Sarkar on Evidence* (14th Ed) related to the House of Lords decision in *Browne v Dunn*. Sarkar makes it clear that the rule applies in relation to cross-examining a witness on essential points said in examination-in-chief. It does not cover issues which are already in dispute before the court. The reason being no parties will be taken by surprise. The issues before the court must be established according to law and one cannot get away citing the rule in *Browne v Dunn*. *Browne v Dunn* does not make the law in respect of legal burden or rules of pleadings relating to joinder of issues otiose. *He who alleges must prove and cannot be equated to being sufficient proof by making the witness available and not leading sufficient evidence in examination in chief. And relying on the purported omission of the defendant to cross-examine on matters which the defendant need not do in law*. In *Aik Ming*, the Court of Appeal was careful in its proposition and said 'may' and referred to the testimony in examination-in-chief, so were the learned authors of *Sarkar on Evidence*. (Emphasis added.)

[55] Having analysed the photographic evidence and the sketch plan as adduced before me it is evident from the photographic evidence that there were three doors connected to the consultation room. However, based on the sketch

A plan, there were only two doors connected to the consultation room. The person in charge of preparing the sketch plan was not called to give evidence before this court. As such I find the sketch plan highly questionable and unreliable and no weight will be placed on the said evidence.

B [56] Notwithstanding what have been said with regard to the sketch plan, s 89(3)(c) of Act 586 expressly provides an inspector the power to detain every person found in the healthcare facility or premises until the premises have been searched. As such, the act of detaining SP1 and the rest of the employees in the clinic cannot be said to be an unlawful act done by the raiding parties.

C INABILITY TO EXTRACT CCTV RECORDING

D [57] It was an undisputed fact between parties that the CCTV decoder of the said clinic had been seized by the raiding party. However, it was the defendants evidence that the said CCTV decoder was sent to cyber security for the purpose of extraction of the CCTV recording on 16 February 2015 but was unable to do so as the decoder will automatically format the DVR cloned hard disk when the CCTV decoder is switched 'ON' as stated in the Cyber Security Malaysia's Supplementary Preliminary Case Report ('the cyber security report').

E [58] The plaintiffs had submitted that it was the responsibility of the defendants duty to ensure that the CCTV decoder was uninstalled by a professional and to ensure that the content of the CCTV was protected from damage so as to enable the production of the CCTV recording. The plaintiffs had in its statement of claim claimed damages for the replacement of software system and hard disk and terminals cum CCTV system. The plaintiffs had further in its submission alleged that something had been done to the CCTV decoder in order to hide and/or conceal the content of the CCTV decoder.

G [59] The defendants in opposing the plaintiffs allegation submitted that the plaintiffs had failed to plead its allegation that something had been done to the CCTV decoder.

H [60] It is well established that it is not the function of the court to build a case for the plaintiff/defendant inconsistent with the pleaded case as may be observed from the decision of the Supreme Court in *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 as follows:

I It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact, it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance.

[61] In *Recaliva Design Steel (M) Sdn Bhd v Vista Access Sdn Bhd* [2008] 6 MLJ 604; [2008] 10 CLJ 491, Hamid Sultan JC (as he then was) on pleading rules and issues to be tried made the following observations:

After having heard the evidence of the defendants, it is crystal clear to me that the version defendants attempted to project to me was never part of their defence. In such circumstances, the court is not obliged to consider in its judgment, stories which are not reflective of the pleadings. Pleadings are essential foundation to analyse disputes. Evidence must relate to pleadings and/or directly relevant to pleadings. The court is not concerned what issues the parties have framed for the determination of the court, when such issues cannot be reflective of the issues to be dealt with pursuant to the pleadings.

[62] Exceptions to the general principle may apply to limited situations as may be seen in *Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185 where the Supreme Court held as follows:

The exception is when such evidence represents a radical departure from the pleadings, and is not just a variation, modification or development of what has been alleged in the pleading in question, please see Waghorn v George Wimpey & Co Ltd [1970] 1 All ER 474; [1969] 1 WLR 1764, which gave rise to a proposition, which was approved by *Ang Koon Kau & Anor v Lau Piang Ngong*, and *John G Stein & Co Ltd v O'Hanlon* [1965] AC 890; [1965] 1 All ER 547; [1965] 2 WLR 496.

Therefore, a court inevitably ought to enquire, when there is failure to object to such evidence when it is adduced, whether it is such a radical departure, if not it is a mere variation, modification or a development, then the impropriety of admission of such evidence at variance with the pleadings is deemed to be waived and the defect in such pleadings cured.

In the instant appeal, evidence bearing on the two alleged defences is not such a radical departure but a mere development of what had been alleged by the defendants. Such a non-radical departure was waived or inferentially consented to when the evidence was adduced without objection by the plaintiffs.

Not having been taken by surprise by the evidence in question is not only indicated by the failure to object to such evidence as and when it was adduced. It is in any event, actually indicated also by the following circumstances in this case. (Emphasis added.)

[63] In the instant case, it was the plaintiffs' claim all along that the search and seizure was done in a rough manner which had caused damages to the plaintiffs' property. As such any negligent act alleged against the defendants does not in my view depart from the plaintiffs pleaded case and will be considered by this court as relevant to the pleadings. Having said that, I will first address the issue of whether or not the defendants had acted negligently in failing to ensure that the CCTV decoder and/or its content was protected from damage so as to enable the production of the CCTV recording. In *Lim Kar Bee*

A *v Abdul Latif bin Ismail* [1978] 1 MLJ 109, Raja Azlan Shah FCJ (as His Highness then was) referred to the common law principles of foreseeability and proximity as the principles giving rise to a duty of care and stated as follows:

B The claim in negligence postulates a breach by the defendant of some duty owed by him to the plaintiff. Accordingly, the first question to be asked and answered is whether a duty was owed to the plaintiff by him of which he committed a breach. In order to determine the existence of this duty, I think a citation of two passages from well-known judgments are relevant. The first is from the judgment of Brett MR in *Heaven v Pender* (1883) 2 QBD 503:

C Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

D The second is from the famous dictum of Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 580:

E You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

F [64] Applying the above principles in the instant case, I am of the considered view that the defendants having seized properties belonging to the plaintiffs owed the plaintiffs a duty of care to ensure that the CCTV decoder and the content of it were not damaged and/or affected from its action. The defendants
G had however produced the cyber security report stating that the CCTV recording could not be extracted as the decoder will automatically format the DVR cloned hard disk when the CCTV decoder is switched 'ON'.

H [65] The burden however is on the plaintiffs to prove its claim that it was the raiding party's negligent act in uninstalling the CCTV decoder which had caused the damage. No evidence was adduced to support the plaintiffs' allegation that the inability to extract the CCTV recording was due to the negligent act of uninstallation. The plaintiffs in failing to prove causation of
I damages cannot in my view turn the tables and require the defendants to prove otherwise. As such I agree with the defendants that until and unless the plaintiffs have discharged the onus on them to prove their case to the satisfaction of this court on the balance of probabilities, the burden does not shift to the defendants.

[66] Having thoroughly scrutinised the documents of pleadings as produced before me, I further find that there was a total absence of the allegation and/or claim made by the plaintiffs with regard to any intentional misconduct committed by the defendants to the CCTV decoder. As such, I am of the considered view that this court is not under any obligation to consider issues which are not related and/or relevant to the pleadings.

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WHETHER OR NOT THINGS SEIZED OUGHT TO BE RETURNED TO THE PLAINTIFFS

[67] The plaintiffs also sought for the return of things seized pursuant to s 96 of Act 586 which read as follows:

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- (1) Anything liable to seizure or detention under this Act shall be liable to forfeiture.
- (2) Where any book, record, document, apparatus, equipment or instrument, has been seized under this Act, the Director General may, at his discretion, temporarily release such book, record, document, apparatus, equipment or instrument to its owner on security being furnished to the Director General's satisfaction that the book, record, document, apparatus, equipment or instrument will be surrendered to him on demand or produced before a court of competent jurisdiction on demand.
- (3) An order for the forfeiture or for the release of all the things seized and liable to forfeiture under this Act shall be made by the court before which the prosecution with regard thereto has been held and an order for the forfeiture of the things seized shall be made if it is proved to the satisfaction of the court that an offence under this Act has been committed and that the things seized were the subject matter of or were used in the commission of the offence, notwithstanding that no person may have been convicted of such offence.
- (4) If there is no prosecution with regard to anything seized such thing shall be taken and deemed to be forfeited at the expiration of one calendar month from the date of seizure unless before that date a claim thereto is made in the following manner:
 - (a) a person asserting that he is the owner of the thing seized and that it is not liable to forfeiture may personally or by his agent authorized in writing give written notice to the Inspector in whose possession such thing is held that he claims the thing;
 - (b) in receipt of such notice the Inspector shall refer the claim to the Director General who may order that such thing be released or may direct such Inspector to refer the matter to a Magistrate or a Judge of a Sessions Court for a decision;
 - (c) the Magistrate or Judge to whom the matter is referred shall issue a summons requiring the person asserting that he is the owner of the thing seized and the person from whom it was seized to appear

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- A** before him and on his appearance or default to appear, due service of the summons having been proved, the Magistrate or Judge shall proceed to the examination of the matter and, on proof that an offence under this Act has been committed and that the thing seized was the subject matter of or was used in the commission of such
- B** offence, shall order the thing to be forfeited and shall, in the absence of such proof, order its release.

- C** [68] In this instant case, the first plaintiff had written a letter dated 17 February 2015 requesting for a backup data of the Gluco Clinic Management System. SP1 had through its solicitors written letters dated 27 February 2015 and 8 May 2015 requesting for the return of the Gluco Clinic Management System. However, the plaintiffs had received no reply from the defendants.

- D** [69] Based on the supplementary preliminary case report dated 29 May 2015, request for analysis was done on 28 April 2015 for the extraction of the CCTV recording whilst request for the procurement of the master record of the Gluco Clinic Management System was made on 21 May 2015.

- E** [70] The defendants had submitted that UKAPS through its investigating officer wished to return the hard disc Gluco Clinic Management System as confirmed by SP1 in his oral testimony. However, he refused to accept it on the ground that the defendants had only decided to return the Gluco Clinic
- F** Management System after and not before this action had been filed by the plaintiffs.

- G** [71] From the express reading of s 96 of Act 586, upon request made by the owner for the return of things seized under Act 586, the discretion is with the director general whether or not to return things seized or to refer matter to a magistrate or judge of sessions court for a decision. The order of forfeiture and/or release of things seized shall however be made by the magistrate or judge to whom the matter was referred to.

- H** [72] As it is my finding that in the absence of any challenge on the validity of the search warrant, the said warrant remained valid and the search and seizure conducted on premise No 4 and the clinic were lawful. The defendants had acted on reasonable ground of suspicion that the plaintiffs had committed an offence under s 31(1)(c) of Act 586 following a public complaint made against
- I** the plaintiffs.

[73] Having scrutinised the totality of evidence before me, it is in my considered view that there is a reasonable and probable cause to suspect that the plaintiffs had committed an offence under s 31(1)(c) of Act 586 and that an

order for the return of things seized by the defendants would adversely affect the investigation conducted against the plaintiffs. As such no order will be made by this court for the return of documents as claimed by the plaintiffs.

A

DEFAMATORY STATEMENTS MADE AGAINST THE SECOND PLAINTIFF

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[74] It was alleged by the plaintiffs that when the raiding party was leaving the plaintiffs' premises after completion of the raid, SP1 heard that SD1 was saying 'Doktor Penipu' which was affirmed by SP3 in her oral testimony. SP1 had in his oral testimony further stated that he had heard one of the member of the raiding party uttered the word 'IC tipu' upon him producing his identification card as requested. This was supported by SP5's and SP3's testimony in court.

C

[75] The defendants in its defence contended that the defamatory statement 'IC tipu' which was allegedly uttered by SD1 was never pleaded by the plaintiffs and that this court ought not consider matters which are not pleaded.

D

[76] Before I proceed on the issue of slander, I find it necessary to first address the issue of SP5's presence in the clinic which was heavily denied by the defendants. It was the plaintiffs' claim that SP5 was present at the time the raiding parties had entered the clinic. The defendants' witnesses had however consistently testified that no patient was present in the consultation room or at the waiting area when the raiding party entered the clinic.

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[77] Despite the defendants' persistent denial of SP5's presence in the clinic at the time the raid was done, it was SP5's testimony at trial that she was called for an interrogation and/or recording of statement at the Pejabat Kesihatan Butterworth which was affirmed by SD6 in her testimony at trial. No reasonable explanation was given to explain why SP5 was a material person to be interrogated and/or have her statement recorded had she not been present at the clinic when the search was conducted.

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[78] From the totality of evidence adduced before me, I find it more probable than not that SP5 was in fact present at the clinic when the raid was done.

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[79] Returning to the main issue in contention ie the claim for defamation. It is an established principle that there are three basic elements to be established by the plaintiffs in order to succeed in its claim for defamation as enunciated in the case of *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315 as follows:

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In our law on libel, which is governed by the Defamation Act 1957, the *burden of*

- A *proof lies on the plaintiff to show (1) the words are defamatory; (2) the words refer to the plaintiff; and (3) the words were published.* Where a defence of qualified privilege is set up, as in the present case, the burden lies on the defendant to prove that he made the statement honestly, and without any indirect or improper motive. Then, if he succeeds in establishing qualified privilege, the burden is shifted to the plaintiff in
- B this case to show actual or express malice which upon proof thereof, communication made under qualified privilege could no longer be regarded as privileged (*Rajagopal v Rajam* [1972] 1 MLJ 45). (Emphasis added.)
- C See also cases of *Kian Lup Construction v Hong Kong Bank Malaysia Bhd* [2002] 7 MLJ 283; [2002] 7 CLJ 32 and *Ismail bin Shamsudin v Abdul Aziz bin Abdan and other suits* [2007] 3 MLJ 512; [2007] 8 CLJ 65.
- D [80] The words ‘IC tipu’ and ‘dokter penipu’ is in its ordinary and natural meaning defamatory in nature and utterance of such words has a tendency to lower the standing of the plaintiff in the mind of the reasonable man of average intelligence. Such words would, in my considered view, be construed by any reasonable man as an indictment of SP1’s dishonourable conduct as a medical practitioner. It was the plaintiffs evidence that at the time the defamatory
- E words were uttered, SP1 was the only doctor present in the clinic. Furthermore, the word ‘IC tipu’ was said when SP1 had hand over his identification card upon SD1’s request which was heard by two other persons ie SP3 and SP5. I am therefore satisfied on the balance of probabilities that the plaintiffs had successfully proven its claim for defamation (slander).
- F [81] I do not agree with the defendants submission in respect of matters not pleaded. It was the plaintiffs claim all along that the manner in which the search was conducted was in a rude and rough manner. Utterance of such derogatory
- G word cannot be said to be unrelated or irrelevant in determining the plaintiffs’ claim. The fact that SP5 whom, in my considered view, is an independent witness to this case had testified affirming the same had further strengthen the plaintiffs claim that such derogatory word was used against SP1.
- H [82] The plaintiffs had further claimed that the press statement made by Director General of Health dated 23 February 2015 had caused damage to the plaintiffs’ reputation in the eye of the public. It was however the defendants contention that the said press statement was done in response to an earlier press statement made by SP2 dated 17 February 2015.
- I [83] Having analysed the said press statements, I am agreeable with the defendants that the press statement dated 23 February 2015 was only made as a reply to SP2’s allegation in his earlier press statement. The plaintiffs had also failed to prove that there was any defamatory statement made by the Director General of Health in the press statement. Having failed to prove the first basic

element in establishing its claim for defamation in respect of the press statement by the Director General of Health, I therefore find the plaintiffs claim with regard to the loss of reputation as a consequence of the press statement released by the Director General of Health unsustainable.

A

WHETHER OR NOT THE PLAINTIFFS ARE ENTITLED TO OTHER DAMAGES CLAIMED

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[84] Subsequent to the raid and interrogation by UKAPS, the plaintiffs claimed that the second plaintiff, due to great pressure, was admitted into Lam Wah Ee Hospital on 22 February 2015 as a result of chest pain and palpitation and the second plaintiff claimed from the defendants the cost of treatment for the sum of RM4,995.

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[85] The plaintiffs further claimed for losses suffered as a result of the search conducted on 16 February 2015 on the ground that there was no data of patients and medicine stocks, hence the said clinic was not able to operate and had to be shut down for a period of two weeks from 16 February–2 March 2015 in order for plaintiffs to manually calculate the medicine stocks, to replace the formal receipt book etc before the said clinic could resume its operation.

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[86] The plaintiffs alleged that the first plaintiff had suffered further losses when the first plaintiff's health services had been suspended by FOMEMA for two weeks and when the Delta Force Security Services & Consultancy Sdn Bhd had terminated it as the panel clinic on 4 March 2015.

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[87] In order to succeed in such claim for damages, the plaintiffs must first satisfy this court on the balance of probabilities that the defendants had caused and/or contributed to the damages suffered by the second plaintiff. On this point, I find importance in placing emphasis on the dictum of Lord Goddard CJ in the case of *Bonham-Carter v Hyde Park Hotel Ltd* [1948] 64 TLR 177 as follows:

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Plaintiffs must understand that, if they bring actions for damages it is for them to prove their damage; it is not enough to write down particulars and, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you give me these damages'. They have to prove it.

H

[88] This was applied in the Malaysian case referred to by the defendants of *Bank Bumiputra Malaysia Berhad v First Circle Rubber Products Sdn Bhd* [2004] 7 MLJ 168; [2004] 1 LNS 267. I am also guided by the Federal Court case of *Datuk Mohd Ali bin Hj Abdul Majid & Anor (both practising as Messrs Mohd Ali & Co) v Public Bank Bhd* [2014] 4 MLJ 465; [2014] 6 CLJ 269 where it was held by His Lordship Arifin Zakaria CJ as follows:

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A [32] It is trite law that a claimant claiming damages must prove that he has suffered the damage. The claimant has the burden of proving both liability and quantum of damages, before he can recover the sum claimed. This follows from the general rule that the burden of proving a fact is upon him who alleges it and not upon him who denies it, so that where a particular allegation forms an essential part of a person's case, the proof of such allegation falls on him (see s 103 of the Evidence Act 1950).
B If he fails to prove both the liability and the quantum of damages, he loses the action.

[33] Therefore, in a claim for damages, it is not sufficient for the plaintiff to merely state the amount of damages that he is claiming, he must prove the damage that he had in fact suffered to the satisfaction of the court. This principle is borne out in the case of *Bonham-Carter v Hyde Park Hotel Ltd* [1948] 64 TLR 177 where Lord Goddard CJ observed:

...
D This statement was cited with approval by Edgar Joseph JR FCJ in *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; [1995] 1 CLJ 15.

[34] The claim by the plaintiff in the present case is for general and special damages arising out of breach of contract and/or negligence. Therefore, the burden rests on the plaintiff to prove the damages and it is not sufficient for the plaintiff to merely assert that he had suffered such damages without proving it (see *The Susquehanna* [1926] AC 655 and *Bolag v Hutchison* [1905] AC 515). In the circumstances, we hold that the learned High Court judge was right in ordering that summary judgment be entered on liability with damages to be assessed (see *Dummer v Brown and Another* [1953] 1 QB 710; *Tan Ah Chim & Sons Sdn Bhd lwn Lim Kean Siew Dan Lain-Lain* [2000] 6 MLJ 670; [2000] 1 LNS 206).
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[89] Guided by the principles above and in view of my finding that the plaintiffs had failed to prove its claim, to this court's satisfaction, that the defendants conduct of search and seizure on premise No 4 and the clinic was unlawful, it is therefore in my considered view that damages claimed as a result of the search and seizure cannot in my view be granted. Furthermore, the plaintiffs had failed to adduce any evidence to prove that the defendants had actually caused the damages as claimed.
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H CONCLUSION

[90] As it is my finding that the plaintiffs had satisfied this court on the balance of probabilities that the action of slander had been committed against the plaintiffs by the second defendant, this court hereby award the plaintiffs RM50,000 against the second defendant as compensatory damages with interest thereon at 8%pa from the date of this judgment until full settlement.
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[91] Safe and except for the damages awarded above, no other damages as claimed by the plaintiffs shall be awarded by this court.

[92] No order for the return of documents and/or other materials seized by the defendants on 16 February 2015 as listed in the search list shall be made by this court.

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[93] Cost of RM20,000 is to be paid by the defendants to the plaintiffs

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Order accordingly.

Reported by Ashok Kumar

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